

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS ARMANDO PERAZA,
Petitioner.

No. 2 CA-CR 2018-0255-PR
Filed November 15, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20143182001
The Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Chief Judge Eckerstrom concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Luis Peraza seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Peraza has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Peraza was convicted of aggravated driving under the influence (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his license was suspended, revoked, or restricted. The trial court sentenced him to concurrent, ten-year terms of imprisonment. This court affirmed the convictions and sentences on appeal. *State v. Peraza*, 2 CA-CR 2015-0284 (Ariz. App. May 18, 2016) (mem. decision).

¶3 Peraza thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel based on counsel's purportedly having told him he was not permitted to testify at a suppression hearing relating to his request to call an attorney at the scene. In an affidavit provided with his petition, Peraza averred: "My attorney advised me that I was not permitted to testify at the evidentiary hearing" The trial court summarily denied relief.

¶4 On review, Peraza again contends counsel was ineffective and argues the trial court abused its discretion in denying relief without an evidentiary hearing. To establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A trial court properly dismisses a post-conviction relief petition without a hearing if, after reviewing the claims presented, it determines the petitioner has stated no claim that "presents a material issue of fact or law that would entitle the defendant to relief" under Rule 32. Ariz. R. Crim. P. 32.6(d)(1).

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¶5 Before trial, Peraza filed a motion to suppress and dismiss, arguing that officers at the scene of his arrest had “unreasonably restrict[ed] the right to counsel” by denying him the opportunity to call an attorney. At the hearing on the motion, an officer testified that when Peraza asked to call an attorney he had attempted to get him a telephone book. But, while he did so Peraza’s “aggressive demeanor escalated”; Peraza was “yelling, screaming, [and] tensing up.” The officer then handcuffed Peraza “behind his back,” testifying that he had not felt “comfortable providing a phone book on scene.” The officer testified he had intended to provide a book when they arrived at the station. Once at the station, however, when the officer went to get the book, Peraza “escalated” again, “yelling” and “screaming” and striking the metal door of his cell. As a result, the officer again handcuffed Peraza behind his back “due to his safety so he wouldn’t hurt himself or others.” The officer subsequently obtained a warrant for a blood draw, and Peraza was transported to the county jail.

¶6 On appeal, Peraza argued the trial court had erred in denying his motion to suppress, and this court affirmed the court’s ruling. *Peraza*, 2 CA-CR 2015-0284, ¶¶ 2-3. We concluded Peraza had “implicitly waived any right to counsel through his unreasonable behavior.” *Id.* ¶ 3 (quoting *State v. Coven*, 236 Ariz. 393, ¶ 15 (App. 2015)). Peraza likewise asserted that the trial court had not “allow[ed] him to testify at the evidentiary hearing,” and we noted that the court had “asked if there were any witnesses on Peraza’s behalf, and his counsel [had] responded in the negative.” *Id.* ¶ 5.

¶7 Peraza’s bald assertion that counsel told him he could not testify did not create an issue of material fact precluding summary dismissal of the petition for post-conviction relief. To state a colorable claim, a defendant must do more than contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998). Our supreme court explained in *State v. Krum*, 183 Ariz. 288, 294-95 (1995), that the trial court is entitled to make a threshold assessment of the credibility of assertions in an affidavit based on the nature of those assertions and the record. Thus, a trial court may reject summarily and without an evidentiary hearing claims based on an affidavit that is lacking in a “reliable factual foundation” and “some substantial evidence.” *Id.*

¶8 Peraza’s claims are contradicted by the record before us. *See Jenkins*, 193 Ariz. 115, ¶ 15 (defendant’s claim he was unaware sentence “must be served without possibility of early release” not colorable when “directly contradicted by the record”). Indeed, although he specified he

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made “no admission as to any of the elements of the charges,” the statement of facts set forth in Peraza’s motion to suppress acknowledged arguendo the officer’s account of his resistance and did not present any contradictory facts, instead arguing only that the officer deprived him of his right to counsel because his alleged actions were not sufficient to impede the investigation. And he makes no claim that counsel failed to provide additional facts he had provided or misrepresented the facts as he had reported them to her, only that she denied him the opportunity to testify at the hearing on the motion.

¶9 Furthermore, although Peraza contends there was a “disparity between” the observations of the officer who testified at the motion hearing and at least one other officer at the scene, he relies on testimony by the other officer at trial and does not provide any statement from that officer. At trial, the officer was asked about Peraza’s behavior upon his first encounter with Peraza; no questions about his conduct over the course of the arrest were asked. And the officer testified that he had primarily dealt with a different suspect. In sum, because Peraza’s assertions merely contradict the record before us, as detailed above, the trial court did not abuse its discretion in denying relief. *See Krum*, 183 Ariz. at 294-95; *Jenkins*, 193 Ariz. 115, ¶ 15.

¶10 Therefore, we grant the petition for review, but deny relief.